

JULIE M. WALTON

IBLA 97-180

Decided September 9, 1999

Appeal from a decision of the Mimbres Resource Area Manager, Bureau of Land Management, New Mexico, finding no significant impact and approving right-of-way for construction of a new road. EA NM-036-97-013; NMNM 91640.

Set aside and remanded.

1. National Environmental Policy Act of 1969: Environmental Statements

An environmental analysis of the impacts of a proposed action under the National Environmental Policy Act of 1969 must address indirect impacts of the activity that are reasonably foreseeable as a consequence of the action.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

A BLM decision to approve a right-of-way based on preparation of an EA finding that no significant environmental impact will occur as a result of issuing a right-of-way grant for an access road will be set aside on appeal if the appellant shows that BLM did not take a hard look at the environmental consequences of its action.

APPEARANCES: Julie M. Walton, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Julie M. Walton has appealed the December 17, 1996, decision of the Mimbres Resource Area Manager, New Mexico, Bureau of Land Management (BLM), deciding to grant a right-of-way to the Dona Ana County Transportation Department (the County) for the construction of a new road connecting to

Frodo Place near Radium Springs in Dona Ana County, New Mexico. 1/ BLM based the approval decision record and concomitant finding of no significant impact (FONSI/DR) on the analysis contained in environmental assessment (EA) NM-036-97-013. 2/

On September 24, 1993, BLM received an Application for Transportation and Utility Systems and Facilities on Federal Lands from the County, stating as follows:

New Mexico State Parks & Recreation would like to take responsibility for the County road from the I-25 Radium Springs exit road to the Leasburg Dam for controlled ingress and egress to the Park's lands in the area. This road would be closed beyond Leasburg Dam. [The Elephant Butte Irrigation District (EBID)] supports closing the road since it crosses a bridge over the Leasburg Canal that is in need of replacing. If the road were closed, a few residents beyond the closure would have only one outlet road which goes under I-25 and is not readily accessible to other road outlets. This application route would afford more direct access to the south and crosses about 1700 feet of Federal lands. Construction would be by County road crews utilizing dozers, motor graders and water trucks. Duration of the construction period should not exceed 30 days.

BLM assigned serial number NM-91640 to the application. 3/ As noted below, the initial route was substantially amended before BLM approved it.

BLM's record is extremely vague as to the geography of the area in question, including the important question of the layout of the roads there. It appears from viewing several maps together that traffic can

1/ Walton's appeal states that she and her fellow residents of Fort Seldon, New Mexico, are appealing. While it is clear from the case record that she has been the leader of a group of residents protesting the road, there is no indication as to which residents of Fort Seldon are appealing. It is also unclear that Walton has authority to appear on behalf of other persons under 43 C.F.R. Part 1. As Walton, who lives on De Beers Drive (which may bear increased traffic resulting from approval of the right-of-way) is plainly adversely affected by BLM's decision, we will refer to her as an individual appellant.

2/ Walton's request for stay of the effectiveness of BLM's decision pending consideration of her appeal was granted by order dated Mar. 4, 1997.

3/ An attached description and draft plat of the proposed right-of-way showed it beginning at the south quarter corner of sec. 2, T. 21 S., R. 1 E., New Mexico Principal Meridian, extending approximately 617 feet westerly along the east-west center line of sec. 2, then extending approximately 1,800 feet northwesterly (running parallel to an existing power line right-of-way) terminating at a road designated D-061 (route D-061). That road is described on a Don Ana County Engineering Services plat as a right-of-way under RS 2477.

presently 4/ proceed south on Route D-061 into the Leasburg Dam State Park, crossing the Rio Grande River and a canal via the canal road and Leasburg Dam, and thence proceed southeast along local roads to Exit 19 on Interstate 25. This route is deemed unsatisfactory by State Park authorities, which want to close the canal road to through traffic. Doing so would, however, apparently block egress from D-061 to the south toward Interstate 25, leaving only access to Interstate 25 by following D-061 north. 5/ The proposed action thus provides for a cutoff from Route D-061 south to Exit 19 on Interstate 25. The problem presented is that traffic using that cutoff will run either on De Beers Drive or Frodo Place, directly through what appears to be a residential area.

On January 23, 1995, the County advised BLM that an archeological site was found on its preferred route and that, accordingly, it was looking for alternative routes. Accordingly, in August 1995, the County substantially revised what it was seeking in its right-of-way application. The revised right-of-way commenced at approximately the same point, but extended only approximately 1,630 feet westerly in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 2 where it moved to the south, leaving Federal lands and proceeding westerly through private lands in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 11, joining D-061 on private lands in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 10. This resulted in a direct road connection between Interstate 25 and D-061 using (from southeast to northwest) either Route 157/Frodo Place or Desert Edge Road/De Beers Drive, the Federal right-of-way, and a right-of-way across private lands. That proposal was ultimately approved by BLM.

In April 1996, the County once again amended its application to extend the right-of-way approximately 2,654 feet easterly from the south quarter corner sec. 2 just to the north of the section line between secs. 2 and 11, parallel to De Beers Drive.

On August 21, 1996, BLM documented an interview with Appellant Julie Walton in which she stated that "she represents the residents adjacent to the proposed road," and that "they are protesting the road the county wants to construct." She stated that they "do not want heavy traffic in their backyard from the Archer Nursery," explaining that the "road would be for the Nursery employees and semi-trucks taking & bringing plants."

However, in October 1996, the County notified BLM that it wished to withdraw its amendment and "go back to the original application," which BLM took to mean the August 1995 proposal. 6/

4/ We are uncertain whether the road remains open at this time.

5/ The record does not establish where D-061 leads to the north. Appellant has indicated that there is an "underpass" at D-061 and Interstate 25 rather than an exit.

6/ It is unclear from this what the County intended. Although the record does not disclose how, BLM presumably consulted with the County to clarify the question.

The EA described the County's intentions as follows:

Dona Ana County Transportation Department proposes to construct a new road which would connect to Frodo Place near Radium Springs in Dona Ana County. Mexico State Parks and Recreation and the Elephant Butte Irrigation District (EBID) proposed to take control of and close an existing road beyond Leasburg Dam which is currently used as an outlet for the area residents. The new road would act as a second outlet for residents of the area who would be left with one outlet located under Interstate 25 when the existing road is closed. * * * The proposed action is in conformance with the 1993 Mimbres Resource Management Plan (RMP).

BLM described the right-of-way as follows in the FONSI/DR:

The [right-of-way] would begin at the intersection of Frodo Place and De Beers Road. [7/] The construction and maintenance [right-of-way] for the road would total 1637 feet in length. The width of the of the [right-of-way] would be 60 feet. The proposed action calls for a total [right-of-way] of 2.14 acres. * * * A layer of base course would then be applied to the area and a layer of double penetration seal would be applied to complete the road surface.

The EA considered four alternatives, including a no action alternative which would have resulted in the application being rejected. In describing the proposed action, BLM stated in the EA that the County had

submitted an application to construct a new road which would connect to Frodo Place near Radium Springs in Dona Ana County. The [right-of-way] would begin at the intersection of Frodo Place and De Beers Road. The construction and maintenance [right-of-way] for the road would total 1637 feet in length. The width of the [right-of-way] would be 60 feet. The proposed action calls for a total [right-of-way] of 2.14 acres.

Thus, BLM determined that the County had elected to go back to the route it proposed in August 1995. That route is 1,637 feet long and 60 feet wide (covering 2.14 acres) and begins at the south quarter corner of sec. 2 at

fn. 6 (continued)

We note that the only application form appearing in the record forwarded by BLM is that filed in September 1993. Inasmuch as the details of the proposal had completely changed from those set out therein, it is unclear why BLM did not require the County to submit a new application form accurately setting forth the details of its application. On remand, BLM should do so.

7/ A map in the record identifies this road as "De Beers Drive."

the intersection of Frodo Place and De Beers Drive in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 2. The route proceeds south and then westerly through private lands in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 11, joining route D-061 on private lands in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 10.

In addition to the proposed action, BLM considered two alternatives and a no-action alternative. Alternative One corresponds to the first proposal made by the County in September 1993 and long since abandoned because of conflicts with two archeological sites. Alternative Two corresponds to the route proposed by the County in April 1996. The EA noted that "[r]esidents of the area are protesting the increase in traffic that would occur as a result of the construction of" the extension proposed by Alternative Two. This is most likely a reference to the objections Appellant raised to BLM on August 21, 1996.

Walton (Appellant) filed a timely appeal from BLM's FONSI/DR. On appeal, Walton further explains the right-of-way is being built "mainly as an access route for the employees of a business called 'Masson's Greenhouse,'" adding that Masson "has been attempting to gain a second access to his plant for both his employees and 18-wheeled semi trucks that make deliveries to his business." ^{8/} It appears that Masson is located on D-061, and that the granting of the right-of-way would facilitate road access to Masson to and from Exit 19 to Interstate 25. As Appellant points out, BLM's record is utterly silent about this aspect of the proposed action, apart from the conversation record in which Appellant discussed the matter with a BLM representative.

BLM noted in its EA that "[t]raffic would increase in the area with an average of 50 vehicles a day entering and then exiting the area," and that "[t]he majority of these would be private vehicles with an estimated 12 delivery trucks a day traveling through the area." There is little doubt that all of that traffic will run either down Frodo Place, directly through the middle of the residential area described in the record as "Fort Selden North Acreage Tracts" and the "Fort Selden Subdivision" to Route 157 and then to Exit 19 of Interstate 25, or across De Beers Drive to Desert Edge Road to Exit 19, around the perimeter of that subdivision.

[1] In making its decision to approve the right-of-way application BLM is required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1994), to take environmental considerations into account and, if necessary, to prepare an environmental impact statement (EIS) for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1994). Federal agencies

^{8/} The nursery or greenhouse was a stranger to the record until Aug. 13, 1999, when Alex R. Masson, Inc. (Masson), which appears to be a wholesale supplier of flowering plants, decorative foliage plants, and plant care accessories, filed a request that we expedite our adjudication of this appeal. Its letter lends support to Appellant's assertions both that Masson is the proponent of and will be the beneficiary of the right-of-way grant here.

may develop EA's to determine whether the environmental impacts of a given action are significant. 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.27. An EA is a concise discussion of relevant issues that either concludes that an EIS is necessary or makes a finding of no significant impact. 40 C.F.R. §§ 1508.9, 1508.13. Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985). A FONSI is the agency's determination that an EIS need not be prepared, as there is no Federal action identified as having a "significant impact." The Federal action here is the decision to grant a right-of-way across Federal lands for a road.

BLM's EA failed to consider any effects other than effects caused by the right-of-way on the Federal land covered by the right-of-way. ^{9/} This was error. The Council on Environmental Quality has provided regulations applicable to and binding on BLM for implementing the procedural provisions of NEPA. 40 C.F.R. § 1500.3; Red Thunder, Inc., 117 IBLA 167, 181 n.11, 97 I.D. 263, 271 n.11 (1990). ^{10/} Those regulations define "effects" that an agency must consider in its environmental analyses, expressly including "indirect effects":

Indirect effects * * * are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.8(b).

^{9/} BLM determined that the proposed action would have impacts insofar as 2.14 acres of Federal lands would be disturbed. It noted that there would be impacts on visual resources, but that these impacts would be compatible with Visual Resource Management Class II objectives; that it would disturb approximately 2.14 acres of soil and vegetation; and that there was a slight potential for water erosion and a slight to very high potential for wind erosion.

^{10/} Agencies like BLM have been required by the courts to consider the effects of non-Federal action where it is made likely by Federal action. In Sierra Club v. Marsh, 769 F.2d at 878-82, the Court concluded that Federal agencies were required to consider the impact of industrial development of nearby private lands that would be facilitated by construction of a cargo port and causeway. Similarly, in City of Davis v. Coleman, 521 F.2d 661, 677 (9th Cir. 1975), the Court concluded that the Federal Highway Administration was required to consider the impact of nearby private industrial development that would be facilitated by a proposed highway interchange. Thus, the court stated that environmental review should "evaluate the possibilities in light of current and contemplated plans and * * * produce an informed estimate of the environmental consequences." Id. at 676 (emphasis added).

Thus, BLM must address "effects related to induced changes in the pattern of land use," if reasonably foreseeable. BLM recognized that approval of the right-of-way would induce a change in the pattern of land use in the form of an increase in traffic (both in volume of vehicles and in vehicle weight) through the Fort Selden subdivision. ^{11/} However, it made no effort to identify any "effects related to" that change.

The Federal action here is the decision to grant a right-of-way across Federal lands to establish access between a County road and an interstate highway. Most of the road itself is not on Federal land, and BLM is not responsible for authorizing it. In its EA, BLM addressed only direct impacts of the road that could result from construction of the road. No off-site environmental impacts, including the impacts of the road on private land, were considered. Even though approval of the road is within the province of the County, impacts resulting from building that road are not properly considered outside of the scope of the EA for the County's Federal right-of-way. See James Shaw, 130 IBLA 105 (1994).

Since BLM did not address them at all, there is little or nothing in the record showing what the effects of granting the right-of-way might be. Nevertheless, numerous indirect effects are foreseeable, as pointed out by Appellant. ^{12/} BLM should have identified these effects and weighed them against the acknowledged benefits of granting the right-of-way. See Southern Utah Wilderness Alliance, 150 IBLA 158, 169 (1999); Paul Herman, 146 IBLA 80, 96 (1998).

[2] A BLM decision, based on preparation of an EA, finding that no significant environmental impact will occur as a result of issuing a right-of-way grant for an access road will be set aside on appeal if the appellant shows that BLM did not take a hard look at the environmental consequences of its action. F. Larry Bartee, 141 IBLA 55, 60 (1997). That is what occurred here. The matter is remanded to BLM to consider the indirect effects of the action, as discussed above.

^{11/} Thus, it cannot be said in the present case that the indirect effects of granting the right-of-way are "remote and highly speculative." Compare Trout Unlimited v. Morton, 509 F.2d 1276, 1283-84 (9th Cir. 1974).

^{12/} Although BLM has required that the roadway built on the Federal right-of-way be sealed, Appellant points out that other roads in the area are not paved, creating the possibility that increased traffic will increase dust in the residential area. Further, it is evident that any 18-wheel truck traffic through a residential area would be a foreseeable effect. Appellant also suggests that BLM's determination of the amount of traffic failed to take into account that Masson is expanding its operations, such that additional traffic was foreseeable.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and the matter remanded for further action.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

